A

KARYA LAGENDA SDN BHD

v.

KEJURUTERAAN BINTAI KINDENKO SDN BHD & ANOR

B

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
HASHIM YUSOFF FCJ
AZMEL MAAMOR FCJ
C [CIVIL APPEAL NO: 02-4-2007(W)]
6 SEPTEMBER 2008

CONTRACT: *Guarantee - Banker's guarantee - Demand for payment - Terms of performance bond - Whether bank guarantee unconditional and* D *"on demand" - Whether demand sufficient to trigger payment - Whether "on demand" guarantee independent of underlying contract - Validity of demand - Liability under bank guarantee*

BANKING: *Securities for advances - Guarantee - Demand for payment - Terms of performance bond - Whether bank guarantee unconditional and* E *"on demand" - Whether demand sufficient to trigger payment - Whether "on demand" guarantee independent of underlying contract - Validity of demand - Liability under bank guarantee*

CIVIL PROCEDURE: *Appeal - Leave to appeal - Whether ought to* F *have been granted - Whether questions posed questions of law or fact - Whether involved a question of importance - Whether there was no necessity or purpose for court to answer questions*

The 1st respondent, the main contractor for the construction of a G certain housing project, engaged the appellant as a sub-contractor for the said project. The 2nd respondent, on behalf of the appellant, issued a bank guarantee in favour of the 1st respondent. Upon the appellant's failure to complete the sub-contract works in time, the 1st respondent then made three claims to the 2nd H respondent in respect of the bank guarantee. The 2nd respondent, however, rejected the claims on the basis that the contract had been terminated when the claims were made. The 2nd respondent then filed an interpleader proceeding for the appellant and the 1st respondent to appear in court to settle the dispute and for them I to state their claims in case the 2nd respondent had to pay them. The High Court judge held that the 2nd respondent had to pay

the amount stated in the bank guarantee and that the appellant had to pay the costs to the 1st and 2nd respondents. Dissatisfied, the appellant appealed to the Court of Appeal, which affirmed the High Court's decision and dismissed the appeal. Hence, the present appeal to the Federal Court, in which the following four questions of law required consideration: (i) did the terms of the performance bond ('bond') in question require the beneficiary of the bond to assert expressly and clearly in its demand thereon that the contractor had failed to perform or had committed a breach of the underlying contract between the contractor and the beneficiary in order for its demand to be valid?; (ii) did the phrase "we hereby submit our claim for the sum of RM2,075,700.94 as provided by the letter of guarantee" in the 1st respondent's demand on the bond, amount to an assertion that the appellant had failed to perform or had committed a breach of the underlying contract between the appellant and the 1st respondent?; (iii) was the contractor precluded by the phrase "notwithstanding any contestation or protest by the contractor" in the bond from raising an objection as to the validity of the demand on the bond or as to the purpose of the bond having lapsed?; and (iv) did the purpose of a bond which guaranteed due performance of the underlying contract lapse once the said contract was mutually terminated so that any demand made on the bond thereafter was valid?

Held (dismissing the appeal)
Per Ahmad Fairuz CJ delivering the judgment of the court:

(1) In respect of Questions (i) and (ii), the bank guarantee was an unconditional and an "on demand" performance bond/bank guarantee. Payment should therefore be effected by the 2nd respondent notwithstanding any contestation by the appellant or the 2nd respondent when a valid demand on the bank guarantee was made by the 1st respondent. All that was required was a demand *simpliciter* to trigger the obligation of the 2nd respondent to make payment. In the instant case, both the High Court and the Court of Appeal had applied the principle in *Teknik Cekap Sdn Bhd v. Public Bank Bhd* where there was no requirement that a beneficiary must assert expressly and clearly that the contractor had failed to perform or had committed a breach of the underlying contract. A

demand was sufficient to trigger payment. This court fully agreed with the ruling made by the High Court and the Court of Appeal. *Teknik Cekap Sdn Bhd v. Public Bank Bhd* (foll). (paras 8, 9 & 10)

(2) With regard to Question (iii), an "on demand" guarantee was independent of the underlying contract. The bank guarantee to which the 1st and 2nd respondents were a party was a distinct legal document from the underlying contract, which was an agreement between the appellant and the 1st respondent. The courts in an "on demand" type bond will not inquire into any breach in the underlying contract. Once a valid demand was issued, the 2nd respondent in the instant case must make payment to the 1st respondent because it had no right to object since the appellant's grievances were matters that must be adjudicated elsewhere. The clause "notwithstanding any contestation or protest by the contractor" in Question (iii) showed clearly that payments would only be made by the bank once a valid letter of demand was received and it was irrelevant whether there was any protest or contestation. The contractor's remedy was to sue in damages. The implication of such a clause was that payment must be made upon receipt of a valid demand. Furthermore, there was a High Court suit where all grievances of the appellant arising under the underlying contract were pending hearing and adjudication. Thus the contractor was precluded from raising an objection as to the validity of the demand on the bond. *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* (foll); *Kerajaan Malaysia v. South East Asia Insurance Bhd* (foll). (paras 11, 12 & 13)

(3) As regards Question (iv), there was no mutual determination of the sub-contract. Although discussions and negotiations were entered into between the parties, the same was unsuccessful and no agreement was reached. Even if there were a mutual determination, the 2nd respondent was still not absolved of its liability under the bank guarantee as it could only be released by "any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction" (cl. 1 of the bank guarantee). *Hemis Interco BV Sdn Bhd v. Syarikat Pembenaan Hashbudin (M) Sdn Bhd* (foll). (para 14)

(4) In considering whether leave ought to have been granted on the four questions in the first place, the questions posed here were questions of fact and not questions of law. The questions also "did not involve a question of importance upon which further argument and a decision of this court would be to public advantage". There was no necessity or purpose for this court to answer the questions. *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prime Realty Sdn Bhd & Ors* (foll). (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama, kontraktor utama untuk pembinaan sebuah projek perumahan, telah mengupah perayu sebagai sub-kontraktor untuk projek itu. Responden kedua, atas pihak perayu, mengeluarkan sebuah bank gerenti kepada responden pertama. Disebabkan kegagalan perayu untuk menghabiskan kerja-kerja sub-kontrak dalam masa yang ditetapkan, responden pertama telah membuat tiga tuntutan kepada responden kedua berkenaan dengan bank gerenti itu. Responden kedua, walau bagaimanapun, menolak tuntutan itu kerana kontrak telahpun ditamatkan apabila tuntutan dibuat. Responden kedua kemudian memfail suatu prosiding interplider bagi perayu dan responden pertama menghadiri diri di mahkamah untuk menyelesaikan pertikaian itu dan untuk menyatakan tuntutan mereka jikalau responden kedua terpaksa membayar mereka. Hakim Mahkamah Tinggi membuat keputusan bahawa responden kedua terpaksa membayar amaun yang dinyatakan dalam bank gerenti dan bahawa perayu terpaksa membayar kos kepada responden-responden pertama dan kedua. Merasa tidak puashati, perayu merayu ke Mahkamah Rayuan, yang mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan itu. Oleh itu, rayuan ini dibuat ke Mahkamah Persekutuan, di mana empat soalan undang-undang yang dikemukakan berikut memerlukan pertimbangan: (i) adakah terma-terma bon pelaksanaan ('bon') yang disoal memerlukan benefisiari bon itu untuk mengatakan dengan nyata dan jelas dalam tuntutan di atasnya bahawa kontraktor telah gagal melaksanakan atau telah melanggari kontrak bawahan di antara kontraktor dan benefisiari supaya tuntutannya boleh dikatakan sah?; (ii) adakah frasa "kami dengan ini menghujah tuntutan kami untuk jumlah sebanyak RM2,075,700.94 seperti yang disediakan oleh surat gerenti" dalam tuntutan responden pertama atas amaun bon itu bermaksud bahawa perayu

telah gagal untuk melaksanakan atau telah melanggari kontrak bawahan di antara perayu dan responden pertama?; (iii) adakah kontraktor dihalang oleh frasa "meskipun apa-apa pertikaian ataupun bantahan oleh kontraktor" dalam bon itu dari membangkit suatu bantahan tentang keesahan tuntutan atas bon itu atau mengenai tujuan bon itu telah luput?; and (iv) adakah tujuan sesuatu bon yang mengerenti pelaksanaan wajar kontrak bawahan luput apabila kontrak itu telah ditamatkan bersama supaya bahawa apa-apa tuntutan yang dibuat atas bon itu seterusnya ialah sah?

Diputuskan (menolak rayuan)
Oleh Ahmad Fairuz KHN menyampaikan penghakiman mahkamah:

(1) Berkenaan dengan Soalan (i) dan (ii), bank gerenti itu merupakan sesuatu bon pelaksanaan/bank gerenti tidak bersyarat dan "atas tuntutan". Bayaran, oleh itu, seharusnya dibuat oleh responden kedua meskipun ada apa-apa pertikaian oleh perayu atau responden kedua apabila suatu tuntutan sah atas bank gerenti dibuat oleh responden pertama. Apa yang hanya diperlukan ialah tuntutan *simpliciter* untuk mencetuskan obligasi responden kedua untuk membuat bayaran. Dalam kes ini, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah menggunakan prinsip dalam *Teknik Cekap Sdn Bhd v. Public Bank Bhd* di mana tidak ada keperluan bahawa seorang benefisiari mesti menyatakan dengan nyata dan jelas bahawa kontraktor telah gagal melaksanakan atau telah melanggari kontrak bawahan. Satu tuntutan mencukupi untuk mencetuskan bayaran. Mahkamah ini bersetuju dengan sepenuhnya dengan perintah yang dibuat oleh Mahkamah Tinggi dan Mahkamah Rayuan. *Teknik Cekap Sdn Bhd v. Public Bank Bhd* (diikuti).

(2) Berhubungan dengan Soalan (iii), sesuatu gerenti "atas tuntutan" ialah berasingan dari sesuatu kontrak bawahan. Bank gerenti yang mana responden-responden pertama dan kedua merupakan pihak kepada ialah satu dokumen undang-undang yang berbeza dari kontrak bawahan, yang merupakan suatu perjanjian di antara perayu dan responden pertama. Mahkamah-mahkamah dalam bon jenis "atas tuntutan" tidak akan membuat pertanyaan tentang apa-apa pelanggaran kontrak bawahan itu. Setelah sesuatu tuntutan sah telah dikeluarkan, responden kedua dalam kes ini mesti membuat

bayaran kepada responden pertama kerana ia tidak berhak membantah disebabkan kilanan perayu merupakan perkara yang mesti dibicara di tempat lain. Klausa "meskipun apa-apa pertikaian ataupun bantahan oleh kontraktor" dalam Soalan (iii) jelas menunjukkan bahawa bayaran hanya akan dibuat oleh bank apabila surat tuntutan yang sah telah diterima dan ia tidak relevan sama ada terdapat apa-apa bantahan ataupun pertikaian. Remedi kontraktor ialah untuk mendakwa dalam ganti rugi. Implikasi dari klausa sebegitu ialah bahawa bayaran mesti dibuat apabila tuntutan yang sah diterima. Tambahan lagi, terdapat satu guaman di Mahkamah Tinggi di mana semua kilanan perayu yang berbangkit daripada kontrak bawahan itu menunggu pembicaraan dan penghukuman. Oleh itu kontraktor dihalang dari membangkit bantahan tentang keesahan tuntutan atas bon itu. *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* (diikuti); *Kerajaan Malaysia v. South East Asia Insurance Bhd* (diikuti).

(3) Berkaitan dengan Soalan (iv), tidak terdapat apa-apa penentuan bersama mengenai sub-kontrak itu. Walaupun perbincangan dan perundingan telah dijalankan oleh pihak-pihak, mereka tidak berjaya dan persetujuan tidak dapat dicapai. Jikapun ada penentuan bersama, responden kedua masih lagi tidak bebas dari liabilitinya di bawah bank gerenti kerana ia hanya boleh dilepaskan oleh "mana-mana klausa kontrak itu atau oleh statut atau oleh keputusan sebuah tribunal yang mempunyai bidangkuasa kompeten" (kl. 1 bank gerenti). *Hemis Interco BV Sdn Bhd v. Syarikat Pembenaan Hashbudin (M) Sdn Bhd* (diikuti).

(4) Dalam mempertimbangkan sama ada kebenaran sepatutnya diberi untuk menentukan keempat-empat soalan itu pada peringkat pertama, soalan-soalan yang ditanya di sini merupakan soalan-soalan fakta dan bukan soalan-soalan undang-undang. Soalan-soalan itu juga "tidak melibatkan soalan yang penting atas mana perbicaraan lanjut dan suatu keputusan oleh mahkamah ini akan memberi faedah kepada orang awam". Tidak terdapat apa-apa keperluan atau tujuan bagi mahkamah ini untuk menjawab soalan-soalan itu. Sri *Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prime Realty Sdn Bhd & Ors* (diikuti).

Case(s) referred to:

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(foll)***

Hemis Interco BV Sdn Bhd v. Syarikat Pembenaan Hashbudin (M) Sdn Bhd [1986] 1 CLJ 562; [1986] CLJ (Rep) 365 HC ***(foll)***

Kerajaan Malaysia v. South East Asia Insurance Berhad [2000] 3 CLJ 705 FC ***(foll)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prime Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(foll)***

Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 CA ***(foll)***

For the appellants - Chen Mian Kuang; M/s MK Chen & Leong

For the 1st respondent - Robert Lazaar (Rodney Gomez with him); M/s Shearn Delamore & Co

For the 2nd respondent - Ganesan Karuppannan (Stanislans Vetharayagam with him); M/s Muhammd Ganesan & Nazri

[Appeal from Court of Appeal; Civil Appeal No: W-02-1184-2005]

[Editor's note: For the Court of Appeal judgment, please see Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2007] 6 CLJ 18.]

Reported by Suresh Nathan

JUDGMENT

Ahmad Fairuz CJ:

[1] The appellant in this case has been granted leave to appeal to the Federal Court on eight questions of law for consideration of the court. However, during the hearing, four questions have been withdrawn leaving four questions of law to be considered by the court namely questions ii, iii, vi and viii:

(ii) Do the terms of the performance bond (the bond) in question require the beneficiary of the bond to assert expressly and clearly in its demand thereon that the contractor had failed to perform or had committed a breach of the underlying contract between the contractor and the beneficiary in order for its demand to be valid?

(iii) Does the phrase 'we hereby submit our claim for the sum of RM2,075,700-94 as provided by the letter of guarantee 'in the 2nd defendant's demand on the bond, amount to an

assertion that the 1st defendant had failed to perform or had committed a breach of the underlying contract between the 1st and 2nd defendants? A

(vi) Is the contractor precluded by the phrase 'notwithstanding any contestation or protest by the contractor' in the bond from raising an objection as to the validity of the demand on the bond or as to purpose of the bond having lapsed? B

(viii) Does the purpose of a bond which guarantees due performance of the underlying contract lapse once the said contract is mutually terminated so that any demand made on the bond thereafter is valid? C

[2] The 1st respondent was the main contractor for the construction of a housing project known as the Sri Rampai Project. He engaged the appellant as a subcontractor for the said project. Amongst others, the salient terms of the subcontract was that the time of completion for the project was 30 June 2004 and liquidated and ascertained damages were payable at the rate of RM30,000 per day. D

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[3] The 2nd respondent on behalf of the appellant issued a banker's guarantee dated 27 June 2003 for the sum of RM2,075,700.94 in favour of the 1st respondent. The said bank guarantee was extended on 29 September 2004 to 31 December 2004. The subcontract works were not completed by 30 June 2004. There was an extension of time issued to the appellant by the 1st respondent wherein the completion date was revised to 22 September 2004. A certificate of non-completion was issued by the 1st respondent on 19 November 2004 confirming that the appellant failed to complete the subcontract works by the revised completion date of 22 September 2004. F G

[4] However the bank guarantee was never extended beyond 31 December 2004. The 1st respondent then made three claims to the bank in respect of the bank guarantee. The 2nd respondent had however rejected the claim on the basis that the contract had been terminated when the claim was made. The 2nd respondent then filed an interpleader proceeding for the appellant and the 1st respondents to appear in court to settle the dispute and for the appellant and the 1st respondents to state their claim in case the 2nd respondent had to pay them. H I

[5] The learned High Court Judge held that the 2nd respondent had to pay the amount stated in the bank guarantee to the 1st respondent and that the appellant had to pay the costs to the 1st respondent and the 2nd respondent. Dissatisfied, the appellant filed an appeal to the Court of Appeal. The Court of Appeal however affirmed the decision made by the High Court Judge and dismissed the appeal. Hence, this appeal to the Federal Court.

Findings Of The High Court

[6] There were three issues considered by the High Court. The first issue was to determine whether the said bank guarantee was a conditional or an unconditional bank guarantee. For this issue, the learned judge said in his grounds of judgment:

> The terms to be perused by the Court are paragraphs 1, 2, 4 and 5 of the said Bank Guarantee. The said terms, upon examination, are the same as the terms of the Bank Guarantee in the following cases: ... Teknik
>
> Cekap ...
>
> Therefore, the Court holds that the Bank Guarantee in this case is also an unconditional bond or an on-demand bond.

The second issue was the effect of not producing the original bank guarantee when making a demand to the bank. For this, the learned judge said:

> .... the Court is of the view that this issue does not effect the status of the 2nd defendant's demand. Nowhere in the said Bank Guarantee (or in the underlying contract) is it stated that the original of the said Bank Guarantee must be produced ...

The third issue was to scrutinize the wording in the demand letter whether it clearly stated the basis upon which the said demand was made. For this the High Court judge decided:

> The words "as provided by the letter of Guarantee" clearly bear the meaning that the demand made by the 2nd defendant is based on the said Letter of Guarantee. This is sufficient as the basis of a demand made on a Bank Guarantee.

The High Court also further explained:

> ... the Court also wishes to refer to the case of Cygal in which the Court of Appeal, after considering the Bank Guarantee which contains clauses similar to those in the present case, held that in such a Bank Guarantee, what was required to be done by the beneficiary to obtain payment under the said Bank Guarantee was merely to make a written demand. That is all. It was not stated that the beneficiary has to expressly state the basis upon which the said demand was made.

Findings Of The Court Of Appeal

[7] The learned judges in the Court of Appeal also reached the same conclusion as the learned High Court judge:

> The learned High Court Judge ruled that the bank guarantee dated 27 June 2003 issued by the plaintiff in favour of the second defendant is an unconditional guarantee or "on demand bond" and all that is required to activate it is a written demand by the second defendant. The learned High Court Judge rejected the argument of the necessity for the second defendant to prove default on the part of the first defendant in performance of the building contract. We are in agreement with the learned High Court judge. It is our judgment that the bank guarantee is a performance bond. Whether a performance bond is conditional or unconditional must depend on the terms of the bond itself ... It is our judgment the above clause is a clear indication that the bank guarantee is an unconditional and "on demand" bank guarantee ... We are of the view, since the bank guarantee being an unconditional and "on demand" bank guarantee there is no necessity for the demand letter as contended by the first defendant to expressly assert that the first defendant had failed to perform or breached the underlying building contract. Hence, the High Court Judge's finding on this issue is not erroneous.
>
> In fact the wordings of the bank guarantee in the present case is identical to the wordings of performance bond/bank guarantee that have come before the Courts. (*Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [1990] 1 LNS 94, *Cygal Bhd* ...) In all these cases the Courts have consistently held that such guarantee/bond is an 'unconditional bond' or an 'on demand bond'. We have no reason to interpret differently.

With regard to the issue about the original bank guarantee, the Court of Appeal judges also reached the same conclusion and in fact found that it is a non-issue.

[8] As earlier stated, four questions of law were posed for our consideration in this Appeal. We shall first consider question (ii) and (iii), focusing on the demand on the bond. The bank guarantee is an unconditional and an on demand performance bond/bank guarantee. Payment should therefore be effected by the 2nd respondent notwithstanding any contestation by the appellant or the 2nd respondent when a valid demand on the bank guarantee is made by the 1st respondent. All that is required is a demand simpliciter to trigger the obligation of the 2nd respondent to make payment.

[9] In the case of *Teknik Cekap Sdn Bhd v. Public Bank Bhd* [1995] 4 CLJ 697, the Court of Appeal held that:

> there need not be any precise words as provided for in the performance bond to be stated in the letter of demand but such a letter must at least assert in substance, the basis of the claim, which in that claim was damages for breach of contract.

[10] Referring to the High Court decision of the instant case, the High Court held "The words 'as provided by the letter of guarantee' clearly bear the meaning that the demand made by the 2nd defendant is based on the said letter of guarantee. This is sufficient as the basis of a demand made on a bank guarantee". In the Court of Appeal judgment of the instant case, it was held that:

> ... We are of the view, since the bank guarantee being an unconditional and 'on demand' bank guarantee there is no necessity for the demand letter as contended by the first defendant to expressly state that the first defendant had failed to perform or breached the underlying building contract. Hence, the High Court judge's finding on this issue is not erroneous.

Therefore it is clear that in the instant case, both the High Court and the Court of Appeal had applied the principle in *Teknik Cekap* where there is no requirement that a beneficiary must assert expressly and clearly that the contractor had failed to perform or had committed a breach of the underlying contract. A demand is sufficient to trigger payment. We fully agree with the ruling made by the High Court and the Court of Appeal.

[11] As regards to question (vi), we will focus on the issue of the right to be heard. An on-demand guarantee is independent of the underlying contract. It must be emphasized that the bank guarantee to which the 1st and 2nd respondent are a party to, is a distinct legal document from the underlying contract which is an agreement between the appellant and the 1st respondent. The courts in an on demand type bond will not inquire into any breach in the underlying contract. This principle can be found in the case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283 where it was held that:

> Dealing further with the construction of the performance bond, since we found it was an on demand performance bond, this would, in our view, make the present performance bonds independent of any underlying concept ... On the type of such pure on demand performance bonds, the issuer should unquestionably pay on demand except in the case of fraud. Any argument or immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud; there was even no allegation of it, let alone any evidence of it.

[12] Therefore once a valid demand is issued the 2nd respondent bank in the instant case must make payment to the 1st respondent because the bank has no right to object since the appellant's grievances are matters that must be adjudicated elsewhere. This can be seen in cl. 1 of the bank guarantee which reads as follows:

> (1) If the contractor (appellant), unless relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal of competence jurisdiction, shall in any respect fail to perform under the contractor commit any breach of his obligation thereunder, then the guarantor (2nd respondent) shall pay to the principal (1st respondent) up to a total aggregate sum not exceeding the amount of Two Million One Hundred Twenty Two Thousand Six Hundred Forty Seven And Sen Eighty Seven Only (RM2,122,647-87) on the principal's demand notwithstanding any contestation of protest by the contractor or by the guarantor or by any other third party, provided always that the total of all partial demands so made shall not exceed the aggregate sum of Two Million One Hundred Twenty Two Thousand Six Hundred Forty Seven And Sen Eighty Seven Only (RM2,122,647-87) and the guarantor's liability to pay the principal as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

[13] The clause 'notwithstanding any contestation or protest by the contractor' in the 3rd question shows clearly that payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. The contractor's remedy is to sue in damages. The implication of such a clause is that payment must be made upon receipt of a valid demand. This principle can be seen in the case of *Kerajaan Malaysia v. South East Asia Insurance Berhad* [2000] 3 CLJ 705 where it was held that:

> Paragraph 1 is so drafted that the guarantor shall become liable merely when demand is made by the Government notwithstanding any contestation or protest by the contractor or the guarantor or by any third party ... Likewise, in the present case, the words 'notwithstanding any contestation or protest by the Contractor or by ourselves or by any other third party' in paragraph 1 above, do not alter the fact that the money is payable on a written demand under and pursuant to the said insurance guarantee. Therefore, on its true construction this insurance guarantee is an on demand performance bond.

Furthermore, a suit is still pending in the KL High Court suit no. S5-22-457-05 where all grievances of the appellant arising under the underlying contract is pending hearing and adjudication. Thus the contractor is precluded by the phrase from raising an objection as to the validity of the demand on the bond.

[14] As regards question (viii), there was no mutual determination of the sub-contract. Although discussions and negotiations were entered into between the parties, the same was unsuccessful and no agreement was reached. Even if there was a mutual determination, the 2nd respondent is still not absolved of its liability under the bank guarantee as it can only be released by "any clause of the contract or by statute or by the decision of a tribunal of competence jurisdiction" (cl. 1 of the bank guarantee). Our instant case is similar to the case of *Hemis Interco BV Sdn Bhd v. Syarikat Pembenaan Hashbudin (M) Sdn Bhd* [1986] 1 CLJ 562; [1986] CLJ (Rep) 365 where it was held:

> (2) the insurance company will have to pay out the amount guaranteed unless as provided in the agreement the subcontractor was relieved from performance by any clause of the contract or by statute or decision of a tribunal which is not the case here.

[15] The respondent's counsel also submitted that even though leave had been granted on the four questions, yet as decided by the Federal Court in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prime Realty Sdn Bhd & Ors* [2003] 3 CLJ 349, the Federal Court was not prevented from reconsidering the issue of whether leave ought to have been granted in the first place. In that case, the respondent's counsel submitted similarly to the situation as in this case, where it was decided at p. 369:

> Coming back to the questions formulated for determination by this Court, it is our view that the questions do not involve a question of importance upon which further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s. 96(a) of the CJA and therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

We agree with the learned counsel that the same approach needs to be taken by us in this case, as we also found that the questions posed are questions of fact and not questions of law. We also found that the questions 'do not involve a question of importance upon which further argument and a decision of this court would be to public advantage.' There is no necessity or purpose for this court to answer the questions.

In the light of the circumstances as mentioned above, we are unanimous in deciding that the appeal be dismissed with costs. Deposit is to be given to the respondent to account for taxed costs.